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July 8, 2005

VIA HAND DELIVERY

Hon. Ron Jones, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

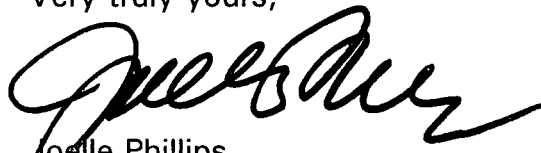
Re: *BellSouth Tariff to Introduce Transit Traffic Service (No. 04-01259)*  
Docket No. 04-00380

Dear Chairman Jones:

Enclosed for filing is an original and 14 copies of BellSouth's letter regarding mediation

Copies of this letter are being provided to counsel of record.

Very truly yours,



Joelle Phillips

Enclosure

JP:nc



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Director Pat Miller  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

Re: *BellSouth Tariff to Introduce Transit Traffic Service (No. 04-01259)*  
Docket No. 04-00380

Dear Director Miller:

BellSouth writes, in response to the Authority's request, to indicate its willingness to participate in a mediation of issues relating to the billing for the transit charges established by the Transit Tariff. Transit traffic is a uniquely important issue *because transit traffic is the result of facilities-based competition from both traditional wireline carriers as well as intermodal carriers, like wireless companies*. Transit traffic did not, and does not, exist absent such competition. The TRA must take care to manage these issues in a manner that recognizes that transit traffic, which requires the existence of a competitive, non-incumbent carrier, is the hallmark of the very competition the General Assembly has worked to bring about. For this reason, the Authority cannot afford to approach transit traffic through the historic, pre-competition perspective of the ICOs. Rather, like all telecom issues, these transit issues must be resolved in a way that continues to support, not undermine, the ability of *all* carriers (CLECs, ILECs, wireline and wireless) to serve customers. The ICOs' positions regarding these issues are not compatible with that goal.

I. The Transit Tariff is Consistent with the TRA's Decision in the ICO/CMRS Arbitration, and Any Change Could Call Into Question that Important Ruling.

As you are aware, BellSouth's Transit Tariff mirrors the decisions rendered by the Authority in the ICO/CMRS arbitration (the "Arbitration") regarding the need for an originating carrier to pay transit charges for its traffic. (Specifically, this decision relates to Issue 3 in the Arbitration, Docket 03-00585.) The Authority's ruling is consistent with the treatment of all intercarrier compensation under the Act. Throughout the years of disputes giving rise to the Arbitration, however, the ICOs simply refused recognizing the existence of (or, more succinctly, the need to compensate for) transit traffic. Due to the ongoing dispute between the ICOs and BellSouth regarding third party traffic that transits BellSouth's network, BellSouth has provided transit services for the ICOs without payment for years. BellSouth awaited the Authority's ruling in the Arbitration before taking any action to force the ICOs to pay for the transit charges for the traffic they originate.<sup>1</sup> Once the TRA addressed the transit traffic issue in the Arbitration, BellSouth created a tariff to follow that decision. The transit tariff was drafted consistent with the arbitration ruling, to provide a mechanism (other than blocking traffic), to ensure payment to BellSouth for the admitted use of its network by the ICOs. Pursuant to this tariff, BellSouth is entitled, consistent with the ruling of the Authority in the Arbitration, to collect a fee when parties refuse to provide for an agreed compensation scheme (by contract) for transit traffic and yet continue to originate and send transit traffic across BellSouth's network.

The ICO's request for an order prohibiting BellSouth from collecting this fee creates an interesting dynamic. The first question asked should be whether the ICOs intend to *continue sending* transit traffic during the time it proposes that BellSouth be prohibited from collection. Clearly, such a situation creates a grave constitutional question regarding whether BellSouth can be compelled to provide network transit services for which it is prohibited from collecting a fee. Any such compelled performance by BellSouth, without remuneration from any source, runs afoul of both state and federal constitutional protections against the taking of property.

If the TRA were to prohibit BellSouth's collection, to cure this takings problem, the ICOs would also have to be prohibited from sending any such traffic to BellSouth's network while BellSouth was prohibited from collecting its fee. Transit traffic originated by ICO end users that terminates to CLEC, CMRS or other ICO end users occurs when the ICOs open the codes necessary to reach those end users by local dialing. Consequently, the ICOs control whether such traffic flows. They cannot be permitted to purposely originate traffic, for which they refuse to compensate transiting or terminating carriers.

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<sup>1</sup> As noted in BellSouth's Initial Response, even while the ICOs began to discuss transit traffic originated by CMRS providers, they still steadfastly refused to entertain discussions about payment on the transit traffic they originate-as if their end users received calls from CMRS end users but never placed calls to those very end users. When BellSouth attempted to negotiate a stand alone agreement on transit traffic, the ICOs indicated they had no interest in discussing any agreement for ICO-originated transit traffic.

The relief the ICOs seek, therefore, creates an additional and vital issue. No doubt, ICO customers expect to be able to use their wireline phone to reach any local number. They have no reason to expect that the ICOs will not provide service that reaches their neighbors homes or their wireless phones with local numbers within the ICO's local calling area.<sup>2</sup> If the Authority were to prohibit the flow of transit traffic, while it prohibited collection of transit fees (which it must do to avoid an illegal taking), it would also need to ensure that end users were informed that their ability to complete these local calls had been curtailed by the ICOs.

As demonstrated by the foregoing, the relief sought by the ICOs raises serious issues of both law and public policy. The ICOs implicit suggestion that BellSouth should be ordered to provide free transit while the parties mediate is simply not legally defensible. Moreover, the ICOs seek relief that is flatly at odds with the ruling by the TRA in the ICO/CMRS Arbitration. In that case, the TRA clearly established that transit traffic fees were to be paid by originating carriers. Here, the ICOs seek a way around that very ruling, which would undermine the TRA's efforts to see that traffic flows to *all* end users-whether wireline or wireless, CLEC or ILEC. The ICOs should not be allowed to use this issue to collaterally attack and undermine the decision of the Authority in the CMRS/ICO arbitration, which would be the exact result if the ICOs requested relief is granted.

## II. BellSouth Has Worked to Implement its Tariff Without Undue Burdens to the ICOs.

During the Authority conference, the ICOs suggested that BellSouth's actions implementing the tariff were unreasonable. We disagree.

First, as established by examples in the attached correspondence, BellSouth representative Gene Lunceford has taken steps to ensure that each ICO has received information regarding the Transit Tariff since the Transit Tariff was approved by the Authority in February. These communications clearly outlined the steps the ICOs should take with regards to the tariff as explained below.

Consistent with the tariff, the ICOs were invited to provide a "PLU" factor (percent local usage) to BellSouth for the purpose of measuring transit traffic. Each and every ICO failed to provide such a PLU. Nonetheless, after BellSouth imposed a PLU based on its own traffic study, BellSouth still worked with ICOs to adjust that PLU to the extent ICOs contended it was incorrect. Based on discussions with individual ICO's concerning their local calling scopes, PLU's for six ICO's have been reduced to zero. PLU's for two other ICO's have been significantly reduced. The use of a PLU to determine usage is consistent with industry standards, as described in the Ordering and

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<sup>2</sup> This also raises the related issue of dialing parity that was clearly addressed by arbitrators in Issues 12

Billing Forum's Message Exchange Carrier Access Billing guidelines, and is used by other carriers without issue. Additionally, BellSouth did not immediately implement the Transit Tariff when approved. Rather, BellSouth chose to refrain from implementing it immediately and has instead implemented it on a delay system. In response to concerns raised by the ICO's, BellSouth delayed the initial billing until June and only included billing for the month of March, 2005 instead of billing for March-May usage. In addition, as noted in correspondence attached, BellSouth has agreed to true up any error regarding implementation of the transit traffic.

The ICOs have not merely objected to payment related to certain "categories" of traffic (like ISP or county-wide calls) as suggested by their petition. Rather, they have refused to agree to payment of any actual dollars, in a campaign of delay reminiscent of their strategy throughout the Arbitration.

The ICOs also suggest that there is no "market" (or alternative) to the use of BellSouth's network for traffic destined to CLECs or CMRS carriers. Again, we disagree. ICOs could contract with the IRIS network (a network owned by various ICOs), for example, to provide transit services, or could negotiate direct interconnection with other competitive carriers. The bottom line is that the ICOs are responsible for negotiating *some arrangement* with *some carrier* to ensure the appropriate delivery of traffic it originates. To date, the ICOs have failed to reach a negotiated settlement of these issues.<sup>3</sup> The petition is an attempt to freeze the parties in a pre-tariff status that is inconsistent with the Ruling in the Arbitration.

Further, the settlement process BellSouth is currently using is an appropriate method for collecting transit charges, and this issue is simply a red herring. What the ICOs hope to obtain by forcing BellSouth to issue a separate bill is the ability to ignore that bill and force BellSouth to litigate before collecting. If the format of billing and payment were truly the issue, then that could presumably be resolved through reasonable negotiation. As yet, the ICOs have refused to negotiate such an agreement and instead appear to be fighting to simply avoid payment and appeal the Arbitration Order when it is released.

### III. Mediation Could Prove Helpful But Should Identify "Undisputed" Amounts First.

The ICOs have simply consistently refused to reasonably address or negotiate the transit traffic issues raised in their filings. Certainly we have had many discussions, but none that would have resulted in any payments for transit traffic originated by the ICOs. Contrary to their assertions at the TRA, the ICOs refuse to acknowledge that any of the transit traffic requires payment. Stated simply, they have disputed every penny applied.

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<sup>3</sup> This failure is hard to understand given the number of ICO-third party agreements addressing both direct and indirect competition. Diagrams in these arguments explicitly show that the ICOs will send traffic via BellSouth.

It took BellSouth's implementation of the transit tariff to force this issue. In order to get to the bottom of these issues, BellSouth believes that mediation under the guidelines set out below would be very helpful.

First, BellSouth notes that because the ICOs appear to be raising billing disputes regarding the understanding of and interpretation of billing records or measurement of traffic, the mediation should provide for BellSouth to meet individually with a representative of *each* ICO to address those billing records *specific to that ICO*. Only by sitting down face to face, one at a time, can such issues (like an appropriate, agreed PLU for a particular ICO) be resolved. The coalition rhetoric is not helpful in that process.

Second, continued collection under the effective tariff during this mediation period is essential. BellSouth has refrained from collecting these amounts for years through an independent action as it has worked to urge the ICOs to recognize the reality of competition that has created the transit traffic issue. BellSouth has never blocked the traffic, yet now BellSouth is being asked to refrain from collecting under its tariff, and, in fact, the Authority has been asked to enter an order prohibiting BellSouth from collecting under its tariff. Respectfully, BellSouth believes that if the ICOs are not facing current collection, we cannot expect this process to move forward. In typical fashion, it has only been with the implementation of this first round of billing under the tariff that BellSouth has seen any response by the ICOs regarding this issue.<sup>4</sup>

In order to address the ICOs' concerns about ongoing billing, BellSouth would urge the mediation of this matter to first address the identification of an amount of *undisputed* billing under the tariff. Specifically, the ICOs simply should not be able to avoid paying by disputing everything. Once that amount is agreed, BellSouth believes the mediation can proceed to the other issues outlined in Chairman Miller's Memorandum to the File of June 27, 2005 to resolve truly "disputed" issues.

BellSouth agrees to mediate because it believes that reasonable negotiation should resolve these issues. BellSouth is not closing the door to any potential, negotiated arrangement for compensating BellSouth for this traffic. After all, the tariff is specifically designed to apply only in the absence of such an agreement. As it has with other types of carriers, BellSouth believes that a reasonable contract for providing transit service can be negotiated for the ICOs. In the alternative, provided the ICOs recognize the TRA's decision that originating carriers cannot refuse to pay for transit services, these issues should not be insurmountable. Perhaps a neutral mediator can assist the parties in working past the present impasse.

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<sup>4</sup> As noted in BellSouth's initial responses, the ICOs were mysteriously absent during the deliberation on the transit tariff and took no action until billing was imminent. This apparent tactical decision has consequences. Having *chosen* to sit back and wait, rather than raise the issue regarding billing, rates, and implementation before approval of the tariff, the ICOs cannot now ask the TRA to suspend the application of that tariff. To permit this would not only run afoul of the statute governing approval of tariffs, it would also incent parties to raise issues tardily.

Director Pat Miller  
July 8, 2005  
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For the foregoing reasons, BellSouth respectfully requests that the Authority appoint a mediator to establish a schedule for mediation of this matter.

Respectfully,

A handwritten signature in black ink, appearing to read "Joelle Phillips", written in a cursive style.

Joelle Phillips

JJP:nc

## CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2005, a copy of the foregoing document was served on the following, via the method indicated:

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
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